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State responsibility

Comments and observations received from Governments

Addendum

Contents

		Page
II.	Comments and observations received from Governments	3
	Argentina	3
	General remarks	3
Part One.	Origin of international responsibility	3
Chapter I.	General principles	4
Article 3.	Elements of an internationally wrongful act of a State	4
Chapter III.	Breach of an international obligation	5
Article 19.	International crimes and international delicts	5
Part Two.	Content, forms and degrees of international responsibility	6
Chapter I.	General principles	6
Chapter II.	Rights of the injured State and obligations of the State which has committed an internationally wrongful act	6
Chapter III.	Countermeasures	7
Article 48.	Conditions relating to resort to countermeasures	8
	Paragraph 1	8

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Part Three. Settlement of disputes 8
Article 58. Arbitration 8
Paragraph 2 8

II. Comments and observations received from Governments

Argentina

[26 March 1998]

General remarks

Argentina believes that the draft articles represent a very important step in the process of the codification and progressive development of international law. The prospective elaboration of an international convention codifying the legal regime of international State responsibility will complete the codification work that began with the Vienna Convention on the Law of Treaties of 1969.

A fair number of provisions in the draft contain and codify existing customary rules, reflecting State practice and doctrinal and judicial interpretation. In that respect, the articles constitute an extremely valuable guideline, which Argentina will take into account in cases where questions of international responsibility must be addressed.

The draft also contains other rules which could constitute a progressive development of international law, as they do not reflect the general practice of States up to this point.

...

With regard to the general economy of the draft, Argentina is also of the view that the Commission should, on second reading, strive to maintain a close harmonization between the codification of this topic and that of the other two related topics that are currently also under consideration, namely, so-called international liability for injurious consequences arising out of acts not prohibited by international law, and diplomatic protection. Indeed, it seems advisable for the regime of international responsibility to be dealt with as a whole, and for all of its aspects to be worked out with the greatest possible coherence and conceptual clarity.

Part One
Origin of international responsibility

Argentina considers that part one of the draft, concerning the origin of international responsibility (articles. 1-35), ... adequately codifies the basic rules of responsibility and outlines the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

Chapter I. General principles

Article 3. Elements of an internationally wrongful act of a State

This characterization of an internationally wrongful act,[1] which relies on two elements (one subjective – the attribution of an act to the State – and one objective – the fact that the act constitutes a violation of international law), does not expressly include the element of *damage* caused as a result of the State's conduct to the detriment of the subject whose subjective right has been impaired.

While a large section of public-law doctrine holds that a reference to damage is obligatory,[2] the Commission did not regard the mention of damage as an essential condition for the existence of an internationally wrongful act.[3]

In this connection it is believed that the characterization formulated by the Commission deserves careful analysis. While it is indeed true that there are various international instruments which create obligations not between States, but between a State and its own subjects (namely, the international human rights protection treaties), it is also true that violations of those instruments have a special prevention and punishment regime (namely, the international human rights protection mechanisms) and do not necessarily give rise to a claim by one State against another.

Nevertheless, in the case of a wrongful act caused by one State to another, which would appear to be the *ratio legis* of the draft, the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim.

In a similar vein, it has been stated that even in the human rights protection treaties, in which a legal relationship is established between a State and the individuals under its jurisdiction, the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties.[4]

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[1] In 1972, at the prompting of the Special Rapporteur, Mr. Roberto Ago, there was a change in the Commission's concept of the international responsibility of the State. Up to the 1960s, State responsibility had been viewed essentially as relating to the protection of aliens. Ago's writings gave rise to a new concept, which is regarded as the fundamental basis of international responsibility: the violation by a State of its obligations towards other States and the international community as a whole.

[2] It has been stated in this connection that "the breach of an international obligation is a necessary but not sufficient element in the case of international delicts. For the purposes of establishing an automatic responsibility link between the acting State and the claimant State, there must be an additional requirement: the damage suffered by the claimant State." Eduardo Jiménez de Aréchaga, *Derecho Internacional Público*, second edition (Montevideo, Fundación de Cultura Universitaria, 1991), vol. VI, p. 35.

[3] The Commission has stated that:

> "International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity." *Yearbook of the International Law Commission, 1973*, vol. II, document A/9010/Rev.1, chap. II.B, para. (12) of the commentary to article 3.

[4] "In the case of a violation of the human rights treaties, the damage sustained by each of the other States parties is a moral damage, which consists of the impairment of its interest in ensuring that the treatment of individuals in all States in the region adheres to the stipulated norms." Jiménez de Aréchaga, op. cit. (footnote 3).

It has also been stated that the damage requirement is, in reality, an expression of the basic legal principle which stipulates that no one undertakes an action without an interest of a legal nature.[5]

The foregoing indicates that it would be advisable for the Commission to reconsider the non-inclusion of the damage requirement in article 3 of the draft from the standpoint of the object and purpose of the article.

Chapter III. Breach of an international obligation

Article 19. International crimes and international delicts

The distinction between international crimes and international delicts deserves to be analysed from two different standpoints: conceptual and nominal. One question is whether, from the substantive point of view, different regimes should be envisaged to regulate the consequences of various categories of violations of the law of nations, and another question is whether both categories can be called "crimes" and "delicts", respectively, using penal terminology.

With regard to the substantive issue, it seems clear that the distinction has a legal basis. Indeed, the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State.

A strong current of opinion has emerged since the Second World War which holds that general international law envisages two entirely different kinds of responsibility regime. The first applies in the case of a violation by a State of rules whose observance is of fundamental importance to the international community as a whole (refraining from acts of aggression, the perpetration of genocide, the practice of apartheid, etc.). The second applies, on the other hand, in cases where the State has only failed to comply with a less important and less general obligation.

In the Commission's view, there are three circumstances which could constitute proof of the existence of such a dual regime: (a) the existence of a special category of rules characterized as "peremptory" or deriving from *jus cogens*; (b) the punishable nature of acts committed by individuals acting as State organs who by their conduct have violated international obligations; (c) the fact that the Charter of the United Nations attaches specially determined consequences to the violation of specific international rules (namely, Chapter VII).[6]

Argentina deems it fitting that the Commission recognized the existence of this distinction based on the gravity and scope of the violation by a State of its obligations. In this respect, it believes that a violation of international law that affects the international community as a whole should have effects commensurate with the seriousness of the wrongful act.

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[5] In this connection, it has been stated that the damage suffered by a State is always the element "that entitle[s] one State to make a claim against another and demand redress" (statement by Mr. Sette Câmara, *Yearbook ... 1973*, vol. I, 1205th meeting, para. 43).

[6] *Yearbook ... 1976*, vol. II, chap. III.B.2, para. (16) of the commentary to article 19.

Accordingly, it is desirable that the Commission should, on second reading, analyse and elaborate as precisely as possible the different treatment and the different consequences attaching to different violations in accordance with this distinction.

With regard to the nominal question, however, Argentina cannot help but express doubts regarding the terminology used (referring to those violations which affect the international community as a whole as "crimes" and to others as "delicts").

In this respect, it should be noted that the adoption of a vocabulary which might be termed "penal-law" or "criminal-law" does not appear to reflect the nature of State responsibility. Indeed, the nature of international responsibility is such that, while it cannot be compared with civil liability, still less can it be compared with criminal responsibility.

The foregoing has even greater relevance at present, when we are witnessing a growing process of the progressive development of international criminal law, as demonstrated by the establishment of the International Tribunals for the former Yugoslavia and for Rwanda, the elaboration by the Commission of the draft Code of Crimes against the Peace and Security of Mankind and, in particular, the work of the Preparatory Committee on the Establishment of an International Criminal Court.

In this context, in which the international legal order tends to draw a clear distinction between the *international responsibility of the State* and the *international criminal responsibility of individuals*, it does not seem advisable to apply to the former a terminology appropriate to the latter, as that would lead to misunderstandings.[7]

Part Two
Content, forms and degrees of international responsibility

Chapter I. General principles

Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Argentina considers that ... chapters I and II of part two, concerning the content, forms and degrees of international responsibility (articles 36-46), adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

[7] In this respect, it has been stated that:

"Neither civil nor criminal, but partaking of both, international responsibility has its own features and cannot be compared with the categories of domestic law, since the society of States has little to do with the international community. From this standpoint, the terms 'crimes' and 'delicts' adopted by the Commission are particularly ill-chosen." Alain Pellet, "Vive le Crime! Remarques sur les degrés de l'illicité en droit international", in *International Law on the Eve of the Twenty-first Century* (New York, 1997), pp. 302-303.

Chapter III. Countermeasures

The provisions dealing with countermeasures (articles 47-50) ... contain certain innovative elements which merit the comments set forth below.

In its general commentary on chapter III, the Commission characterizes countermeasures as "unilateral measures of self-help". They "take the form of conduct, not involving the use or threat of force, which – if not justified as a response to a breach of the rights of the injured State – would be unlawful as against the State which is subjected to them".[8]

The Commission, while maintaining that countermeasures "should not be viewed as a wholly satisfactory legal remedy, ... because of the unequal ability of States to take or respond to them", adds, however, that:

> "[r]ecognition in the draft articles of the possibility of taking countermeasures – warranted as such recognition may be in the light of long-standing practice – ought accordingly [to] be subjected to conditions and restrictions, limiting countermeasures to those cases where they are necessary in response to an internationally wrongful act".[9]

In this connection, it is believed that, while countermeasures have been applied on various prior occasions, the taking of countermeasures has several aspects which may be regarded as questionable:

(a) their lawfulness or unlawfulness is, in many cases, very difficult to determine;

(b) the countermeasure adopted is not always proportional to the nature of the wrongful act committed by a State;

(c) the affected State is generally incapable of making an objective judgement of the lawfulness or unlawfulness of an act committed by another State;

(d) as affirmed by the Commission itself, the capacity of States to take countermeasures or to respond to them is very unequal, depending on the resources at their disposal.

In a similar vein, article 48 (Conditions relating to resort to countermeasures) provides that the injured State, in fulfilling its obligation to negotiate, is entitled to take "interim measures of protection which are necessary to preserve its rights" (para. 1).

In its commentary, the Commission characterizes "interim measures of protection" as inspired by "procedures of international courts or tribunals which have or may have power to issue interim orders", and uses as an example the freezing of assets.[10]

The Commission considers that a feature of "interim measures of protection" is that "they are likely to prove reversible should the dispute be settled". In this connection, the Commission adds: "the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation."[11]

Argentina is of the view that, while it is true that the practice of taking countermeasures or reprisals has been common in conflict relations between States, it is

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[8] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.D.2, para. (1) of the general commentary to chapter III.

[9] Ibid.

[10] Ibid., para. (4) of the commentary to article 48.

[11] Ibid.

also true that, at the current stage in the evolution of the international community, countermeasures should be considered only as a last resort, once the various methods of peaceful settlement of disputes, and above all the obligation to negotiate, have been exhausted.

The taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations, and thus comparable to what is termed a "state of necessity" in domestic law.

In this connection, it is appreciated that the option of taking countermeasures is not only granted in a general way to States, but is, in addition, strengthened by the option of taking the aforesaid "interim measures of protection". The latter would appear to differ from countermeasures not in their nature but in their degree or duration.

In the light of the foregoing, it would be extremely useful for the Commission, in its second reading of the draft articles, to reconsider carefully the provisions dealing with countermeasures. It might be possible to reverse the presumption of the lawfulness of countermeasures by providing that, while States do not have a right to take them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful.[12]

Article 48. Conditions relating to resort to countermeasures

Paragraph 1

[See part two, chapter III, and article 58.]

Part Three
Settlement of disputes

The provisions dealing with ... settlement of disputes (articles 54-60) contain certain innovative elements which merit the comments set forth below.

Article 58. Arbitration

Paragraph 2

The part of the draft articles which refers to the settlement of disputes is closely related to the taking of countermeasures, and it is in that connection that we wish to make comments on it.

Article 58, paragraph 2, provides that:

[12] Moreover, the judicial precedents do not provide an unequivocal solution. In the arbitral award in the *Naulilaa Accident* case, it was stated that a reprisal is unlawful if it is not preceded by a fruitless claim exercised by the State which has suffered the violation. The arbitral award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946 concluded between the United States of America and France* admitted the possibility of adopting certain countermeasures before an impartial dispute settlement mechanism exists.

"where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, *the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal* to be constituted in conformity with annex II to the present articles". (emphasis added)

In this connection, it is believed that, in the Commission's scheme, the main limitation of countermeasures arises precisely from the compulsory arbitration scheme provided for in the draft articles. Such a solution requires careful consideration.

Compulsory arbitration would be extended to virtually all areas of international law, since the draft seeks to establish a general and comprehensive solution to the legal problems deriving from the international responsibility of the State.[13]

In this connection, it is necessary to consider the degree of universal acceptance which the compulsory arbitration scheme proposed by the Commission would have. Indeed, if that solution failed, the option of resorting to countermeasures would lose its main check and balance. Countermeasures and compulsory arbitration should be regarded as two sides of the same coin.

For that reason, it would be advisable for the Commission to reconsider these aspects, bearing in mind that the regime of countermeasures could be reformulated and that the compulsory arbitration scheme provided for in the draft articles could be made more flexible.

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[13] In this connection it should benoted that, in a part of the commentary on article 58, paragraph 2, the Commission states that "this dispute, in its turn, may include not only issues relating to the *secondary* rules contained in the draft articles on State responsibility, but also the *primary* rules that are alleged to have been violated" (emphasis added). *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), chap. IV.C, para. (5) of the commentary to article 5.